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Nos. 178 & 179

In the Supreme Court of the United States

OCTOBER TERM, 1967

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

UNITED INSURANCE COMPANY OF AMERICA, ET AL.

INSURANCE WORKERS INTERNATIONAL UNION, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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OPINIONS BELOW

The opinion of the court of appeals (R. 1231–1243) is reported at 371 F. 2d 316. The Board's decision and order (R. 1199–1200, 1122–1183) are reported at 154 NLRB 38.

JURISDICTION

The judgment of the court of appeals was entered on December 21, 1966 (R. 1244). On March 16 and 21, 1967, Mr. Justice Clark extended the time for filing petitions for writs of certiorari to and including May 20, 1967. On May 19, 1967, the Board (No. 178) and the Union (No. 179) filed petitions, and, on October 9, 1967, both petitions were granted (R. 1245, 1246). The jurisdiction of this Court rests on 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act, 29 U.S.C. 160(e).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are set forth in the Appendix, *infra*, pp. 31–32.

QUESTION PRESENTED

The protective provisions of the National Labor Relations Act extend only to employees—a category which excludes "any individual having the status of an independent contractor" (Section 2(3)). In this case, the National Labor Relations Board found that "debit agents" of an insurance company were employees within the meaning of the Act. The question presented is whether the Board properly construed and applied the standards for distinguishing employees from independent contractors, so that the court of appeals overstepped its reviewing function in setting aside the Board's order.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

United Insurance Company of America ("United") is engaged in the sale of insurance [1] through its home office in Chicago, Illinois, and its district offices located in most states. Every district office has a manager and several assistant managers. Each assistant manager is in charge of a staff of four or five individuals called "debit agents." United has 3300 such agents. (R. 1126, 1165; 40–42, 396–397, 421, 458–459, 469, 1045, 1046.)[2]

On June 4, 1964, the Insurance Workers International Union filed a petition with the Board seeking certification as the collective bargaining representative of United's debit agents in Baltimore City and Anne Arundel County, Maryland. United, however, asserted that the debit agents were "independent contractors" and not "employees" within the meaning of the Act. The parties agreed to a consent election, with United reserving its right to contest the issue of coverage after the representation proceeding. The Union won the election,[3] was certified by the Board on August

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[1] United writes and sells industrial and ordinary life insurance, and industrial and commercial health, accident, and hospitalization insurance (R. 95, 396–398). It also handles fire insurance written by United Fire Insurance Company (R. 25, 46, 63–67, 424–425, 1062–1063).

[2] Page references before the semicolon are to the administrative findings, those after to the evidence.

[3] Some debit agents, who were included in the agreed-upon unit and who voted in the Board-conducted election, had been employed by Quaker City Life Insurance Company prior to that company's merger with United shortly before (R. 1133–

14, 1964, and requested recognition from United on August 20. On September 1, United refused to recognize the Union, solely on the ground that its debit agents were independent contractors rather than employees. (R. 1122–1123, 1132–1133; 8–9, 1045–1050.) This unfair labor practice proceeding ensued.[4]

The Board made the following findings with respect to the status of the debit agents:[5]

1. HIRING AND JOB ASSIGNMENT

United obtains debit agents through newspaper advertisements, referrals, and from other companies. A prospective agent must fill out an application provided

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1134; 177–178, 183–185, 334–339, 349–352, 384–387, 404, 1117–1118). As the court of appeals noted (R. 1233), "Quaker had chosen to maintain an employer-employee relationship with its debit agents, and its agents in Baltimore City and Anne Arundel County were represented by the Union."

[4] The Union was the charging party before the Board, and intervened in the proceeding by the Company in the court below (in which the Board cross-petitioned for enforcement) to review the Board's order. The Union also filed a separate petition for review seeking additional relief that the Board had not awarded. In light of its determination to set aside the Board's order, the court below found it unnecessary to consider the Union's petition. Both the Board (No. 178) and the Union (No. 179) filed petitions for certiorari; because the Board was a respondent in the Union's proceeding below, it is a respondent in No. 179. The Union, however, is not pressing in this Court its prayer for further relief from the Board, and thus both the Board and the Union are urging the same positions before this Court.

[5] The Board adopted (R. 1199–1200) the findings, conclusions, and recommendations of the trial examiner (R. 1122–1183), although it expressly disavowed his observation that the demeanor of the debit agents to their supervisors during the hearing further suggested the employer-employee relationship.

by the Company and be interviewed by a district manager. No prior experience in insurance work is required. (R. 1139; 199–200, 403–404, 725–727, 768, 831).

When United hires an applicant, it assigns him to a particular district office, under the supervision of a particular assistant district manager (R. 1165; 40, 42, 147, 854).[6] A State license, costing from $2.50 to $10.00, specifically permits the agent to sell insurance only for the Company. Although some agents may pay the initial fee for the license, the Company always pays the cost of renewing it. (R. 1138–1139; 24–26, 456, 694, 728, 755, 811.) The Company then issues him a "debit book." This book—which is Company property and must be returned to the Company upon termination of the agent's service (R. 1155; 148–149, 473, 490)—contains the names and addresses of the Company's existing policyholders in a relatively concentrated geographic area. The debit agent's job is to collect premiums from the policyholders listed in this book, to prevent the lapsing of policies, and to sell such new insurance as time allows. Since he works mainly with industrial insurance, however, which unlike ordinary or commercial insurance involves smaller coverage or benefits and provides for the payment of premiums on a weekly basis, the collection of premiums occupies the bulk of the agent's time, and there is little time left for new sales. (R. 1137–1138,

[6] The Company may thereafter transfer him to a different location or supervisor (R. 1157; 292–294, 480–481). The agent's business card contains the phone number and address only of the district office to which he is assigned (R. 757–758).

1150, 1169; 23–24, 40–44, 95, 186–187, 216–217, 357, 397–398, 417–418, 694–695, 700–702, 727, 740–741, 756, 815–817, 854, 860–863). An agent is expected to secure Company approval for the transfer of the administration of a policy to another agent (R. 1160–1163; 74–75, 138–140, 148–149, 243–245, 248–251, 340–342, 359–362, 376–377, 841, 1065).

2. COMPENSATION AND EXPENSES

United directly compensates the debit agents pursuant to the "Agent's Commission Plan." The plan, which is unilaterally promulgated by the Company, is uniform as to all agents, and must be signed by each agent when he is hired (R. 1175; 27, 183, 185, 491–494, 1051–1059). The Company may unilaterally amend the plan at any time and existing agents may then choose to work under the plan they originally signed or under the new arrangement. New agents, however, must accept the most recent plan. (R. 1175; 491–494, 706, 893).[7]

The plan basically provides that a debit agent may retain 20 percent of his weekly premium collections

[7] By executing the "Agent's Commission Plan," an agent agrees that "he will promptly deposit with the Company all moneys collected * * * and due the Company," and that "the Company reserves the right to conform commission payments to the agent in accordance with the true condition of his account and records" (R. 1058). As shown *infra*, pp. 11–12, United exercises this right by means of a weekly review of the agent's deposits and accounts (R. 1143; 41, 55, 1060–1064).

on industrial insurance (R. 1143, 1175, 1178; 1051).[8] In addition, the agent receives 10 percent of the premiums collected from holders of ordinary insurance, and 50 percent of the first year's premiums on new ordinary insurance sold by him (R. 1056–1057). Unlike the industrial insurance premiums, the agent remits the entire ordinary premium to the Company and the Company then pays him the percentage owed (R. 812–815). The Company also provides a "service award bonus," essentially a vacation-with-pay plan under which an agent may take one or two weeks off

[8] The "Agent's Commission Plan" also provides for weekly bonuses, ranging from 2 to 4 percent of weekly collections, to agents whose collections average 95 percent or more of the premiums due and who have increases in collections averaging 50 cents per week (R. 1051–1052). The agent is also credited with a reserve account, essentially composed of premiums on new policies sold by him minus premiums on lapsed policies; and the Company adds to this reserve a quarterly bonus if the agent has a 92 percent or better collection average and a 50-cent weekly increase. From this reserve an agent with a 90 percent or better collection average may draw $1.00 to $3.50 weekly, depending on his collection average and the size of the reserve. He may "sell" his reserve to the Company every six months if he has a 95 percent collection average and has serviced the debit for more than a year, "but in no case will the Company purchase" reserves "exceeding $500.00 for any six month period" (R. 1178; 1052–1057, 198, 730–739). Thus, the plan limits an agent's earnings by limiting the amount of new business commissions that he may draw per week, and the amount that can be drawn from the reserve for any six-month period (R. 1178; 198, 730–739, 1052–1053, 1056–1057).

depending on his length of service with the Company and be paid a percentage of the average of his earnings for the preceding four weeks. The choice of vacation periods turns on seniority with the Company, after the assistant manager has selected his vacation. While the agent is on vacation, the assistant manager collects premiums and sells new policies for him, for which the agent receives the usual commissions and credits.[9] (R. 1153, 1154, 1156–1157, 1164–1165; 146–148, 474–476, 646–647, 752). The debit agents participate in the group insurance plan and profit-sharing pension fund maintained by the Company, which is expressly for the benefit of "eligible employees,"[10] and the amounts contributed by them are supplemented by the Company (R. 1176–1177; 71–73, 890, 891, 904, 1098–1104). The Company pays employer social security taxes for the agents and may also withhold income taxes for them (R. 1177–1178; 704, 884–889, 923–925).

In addition to the debit books, United supplies the agents, at its own expense, with rate and premium receipt books; application, transfer, lapse, and reporting forms; and various sales aids and brochures (R. 1144, 1166; 44–45, 92, 113–117, 747–748, 1060–1096).[11] At the district offices, the Company also provides the

[9] Assistant managers similarly substitute for agents who are ill (R. 1164; 428, 566–567, 646–647).

[10] The Rules of the fund define "employee" as including "for the purposes of this plan only, any industrial agent" (R. 1099).

[11] Like the debit books (*supra*, p. 5), the rate and premium receipt books also remain the property of the Company and must be returned upon termination of service (R. 1155; 1068, 148–149, 473, 490). The sales materials distributed bear only United's name; the name of the agent does not appear (R. 113–120).

agents with work tables, chairs, office equipment such as adding machines, telephone service, clerical help, and the postage used in sending receipts to policyholders who have remitted their premiums by mail, all without cost to the agent (R. 1179; 61–62, 97–98, 121–124, 298–302, 339–340, 446, 458, 725, 1097). The agents do not have regular offices for which they pay rent, although some set aside a work space in their homes and deduct the maintenance involved for tax purposes (R. 1179; 125, 230–231, 725, 761, 788, 821–822, 866–867). They have no employees or regular assistants and, indeed, are forbidden to hire unlicensed persons to do their collecting; do no advertising; and are not required to provide a bond (R. 1140–1141; 71, 117–118, 148, 723, 788, 818). The Company for all practical purposes assumes the losses resulting from theft of collection moneys from agents (R. 1170–1173; 149–157, 211–212, 312, 513–516, 573–587, 1115–1116). When an agent's debit covers a wide area or is a considerable distance from the district office, the Company pays him an additional one percent of collection for travel expenses (R. 1155, 1176; 357–358, 375, 409–410, 447–448, 519–520, 617).[12]

3. SUPERVISION AND TERMINATION

On the important issue of the Company's right and exercise of control, the Board found that the high ratio of district managers and assistant managers (*supra,*

[12] Except as noted above, agents pay their own telephone, postage, and transportation expenses (R. 408–409, 540–541, 818). Those who use business cards and distribute small gifts to their policyholders bear the expenses involved (R. 1140; 408–409, 507–508, 617–618, 707–708, 757–759, 835, 851–852, 1114).

p. 3) assures the Company of close supervision of its debit agents throughout their service (R. 1156, 1165; 42, 317, 355–357, 471). At the outset, the assistant manager accompanies a new agent on his rounds to acquaint him with his customers and show him the approved collection and selling techniques (R. 459, 727). The agent is also supplied with a Company "Rate Book" containing detailed instructions on how to perform many of these duties; the Company requires the agent to follow these rules (R. 92, 483–484, 1068–1069).[13] Whenever the Company deems it necessary, an assistant manager or other Company official accompanies an agent on his rounds (R. 1164, 1166; 131–137, 517, 594, 722, 743–744). The manager or assistant manager may also call on a policyholder with the agent if a premium has not been collected by the twentieth of the month, and the Company requires that a "supervisor" call on policyholders whose policies have lapsed (R. 1153; 1108, 1112). An assistant manager periodically accompanies each agent on a "field inspection" of the policyholders' premium receipt books (R. 568–569). As previously mentioned, when assistant managers service agents' accounts during illness or vacation, their efforts are credited to the

[13] For example, the rate book describes the specific manner in which an application for insurance should be filled out, including the way an agent and applicant should sign (R. 1089–1090, 1095–1096). Managers must approve all applications for ordinary insurance obtained by agents in their first year of service, and, thereafter, must review every such application when the applicant has not had a medical examination (R. 1138, n. 20; 1088, 1111).

agents involved (see note 9, *supra*, p. 8, and accompanying text).

When a policyholder has not paid his premium for several weeks, the agent is required to file a report, signed by a manager, on a lapse form provided by United (R. 81–84, 1066–1067, 1091–1092). The sanction imposed by the Company for failure to make such a report before the fourth week of nonpayment is that the agent himself becomes liable for premiums due thereafter (R. 620–623, 896–897). If a collection is made before the expiration of four weeks, the agent must call the office to have the listed policy removed from the lapse form (R. 82). The Company requires the agent to carry lapsed policies on his debit book for 13 weeks (R. 362, 377–378, 896–897, 913).

Furthermore, once each week, on a day designated by United, the agent is required to report to the district office in order to turn over the premiums collected, file weekly reports, and attend staff meetings (R. 1144–1149, 1166; 41, 54–55, 126–127, 419, 450, 504–506).[14] The reports must be submitted on forms supplied by the Company (R. 1148–1149; 54–59, 64–68, 420–421, 606, 1060–1064), and the agent "warrants the accuracy of his accounts and records" (R. 1058). The "Agent's Weekly Account" form shows the collections

[14] "All agents in the district attend unless they are excused" (R. 1146; 41). In special circumstances, a change in the schedule is permitted, or an assistant manager may direct an agent to meet him in order to turn in new business early (R. 1145–1147; 41, 332–334, 363–364, 379–380, 506, 720, 779).

for the week, the agent's collection percentage, the increase or decrease in business for the week and since the beginning of the year, the amount of reserve the agent has accumulated, and the balance due the Company (R. 1062–1063). The "Abstract of Agent's Weekly Report" indicates the amount the agent must remit to the Company; it also contains spaces for amounts to be paid to the Company for social security tax, withholding tax, pension fund, and group insurance (R. 67–70, 884–885, 1064). The assistant manager reviews these reports, requires the agent to make the necessary changes, and approves them when correct. He then returns the reports to the agent, who deposits the reports and funds due the Company with the Company cashier. (R. 1148, 1164; 55, 482–483, 1060–1064.)[15] At the staff meetings, the managers discuss the latest bulletins and directives from the home office, familiarize the agents with policies on which production is low, ask for pledges of new business, demonstrate sales techniques, and explain new policies (R. 1145; 128–132, 529–531, 533, 796–800, 806–808).

United also requires that each of the agents submit quarterly a complete audit of his debit book, on a form provided by the Company, reflecting the actual paid-up status of each of his policyholders; he must then make a true cash accounting (R. 55–58, 1060–

[15] Agents may not settle their accounts by personal check without special permission (R. 1148; 68, 450).

1061). In addition, the manager may order an audit of an agent's debit at any time (R. 613, 615).[16]

Complaints against an agent are investigated by the manager or assistant manager, and, if well founded, the manager talks with the agent to "set him straight" (R. 421, 451–452). Agents who have poor production records, or who fail to maintain their account properly or to follow Company rules, are "cautioned" (R. 721). While United does not require agents to make collections or sell during any specific hours, it expects them to obtain a high percentage of collections, to avoid policy lapses, and to bring in new business (R. 1141–1143; 131, 238–239, 343, 440, 491, 519, 770–771, 822–825). The district manager submits a weekly report to the home office, specifying, *inter alia,* the agents whose records are below average; the amounts of their debits; their collection percentages, arrears, and production; and what action the district manager has taken to remedy the production "let down" (R. 344–347, G.C. Exh. 40 A–H). If improvement does not follow, the Company asks such agents to "resign," or exercises its right under the "Agents

[16] A few debit agents infrequently handle claims for United, after first obtaining special permission from it. The Company turns over the claim to the agent, who verifies it and then returns it for further processing and payment. An assistant manager may either accompany the agent when the agent is verifying the claim or may verify the claim independently. (R. 1167; 521–522, 98–99, 273–277, 474, 783–787, 846–850.)

Commission Plan" to fire them "at any time" (R. 1142–1143; 1058, 1120, 442–443, 466–467, 568, 569, 591–600, 609–610, 615–616, 721–722.) As the Chairman of the Board of United explained in a letter which he had read to the debit agents around the time this unfair labor practice proceeding arose (R. 1149; 690–692, 1120):

> * * * if any agent believes he has the power to make his own rules and plan of handling the company's business, then that agent should hand in his resignation at once, and if we learn that said agent is not going to operate in accordance with the company's plan, then the company will be forced to make the agents final. * * * [W]e will not allow anyone to interfere with us and our successful plan.

B. THE DECISIONS OF THE BOARD AND COURT OF APPEALS

On the basis of the facts summarized above, and in light of the record as a whole, the Board determined that the debit agents were "employees" within the meaning of the Act, and not "independent contractors." The Board therefore concluded that United had violated Section 8(a)(5) and (1) of the Act by admittedly refusing to bargain with the Union after it won the representation election and had been certified as the representative of the agents in an appropriate unit. (R. 1199–1200, 1180–1183.) The Board's order, traditional in such cases, required United to cease and desist from the unfair labor practices found, to bargain with the Union upon request, and to post appropriate notices (R. 1181–1183).

On the Company's petition to review and the Board's cross-petition to enforce, however, the court of appeals found that the debit agents were independent contractors, and declined to enforce the Board's order (R. 1231–1243). The court viewed the evidence as "consistent with an independent contractor status" (R. 1239). In reaching this conclusion, the court accorded no significance to the evidence showing United's "financial controls, accounting procedures, and business methods and practices," since those factors "would appear to be normal to the operation of the premium collection phase of" the Company's business whether it was operated through employees or independent contractors (R. 1239). The court further discounted evidence of Company insistence on attendance at sales meetings and conferences with assistant managers because such evidence was "equivocal" (R. 1241). The court finally concluded that there "is too much which detracts from the weight of the evidence relied upon to support the findings and conclusions." (R. 1243.)

Both the Board (No. 178) and the Union (No. 179) now challenge this adverse ruling.

SUMMARY OF ARGUMENT

The Board properly exercised its authority in concluding that United's debit agents are employees rather than independent contractors. The Board applied the proper legal standard, *i.e.*, the governing principles of the law of agency. It also reasonably evaluated the facts in the record as indicating employee status. The Board found that United exercises

substantial direction and control over the performance by the agents of their work; that the agents have relatively permanent working relationships with United; that they make no significant capital contribution, assume no risk of loss or possibility of profit in excess of their limited commissions; that their work is intimately involved in the Company's routine business and is not merely the ad hoc rendition of services; and that their work requires no prior experience or special training. These and other facts fully support the Board's conclusion.

In reversing the Board's determination, the court below improperly substituted its own assessment of the significance of the evidence for that of the agency. The court quarreled with the Board's resolution of conflicting inferences, and preferred its own conclusions; it refused to accord sufficient weight to the Board's primary responsibility for applying the terms in the statute it administers, in variant factual situations.

ARGUMENT

THE BOARD PROPERLY DETERMINED THAT THE COMPANY'S DEBIT AGENTS ARE EMPLOYEES WITHIN THE MEANING OF THE ACT

A. THE BOARD WAS REASONABLE IN CONCLUDING THAT, ON THE RECORD AS A WHOLE, THE DEBIT AGENTS ARE EMPLOYEES OF THE COMPANY, RATHER THAN INDEPENDENT CONTRACTORS

1. The protective provisions of the National Labor Relations Act extend only to "employees"—a term which excludes "any individual having the status of an independent contractor" (Section 2(3), *infra*, p.

31). Congress has made it clear that whether an individual is an employee or an independent contractor is to be determined by application of general agency principles.[17] Although the court below focused predominantly on the Company's right of control *vel non* over the manner and method by which the debit agents perform their assignments,[18] under agency principles

[17] In excluding "independent contractors" from the definition of "employee" in 1947, Congress indicated an intention to overrule the substantive holding in *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U.S. 111, insofar as it rested on the premise that agency principles were not dispositive in determining whether an individual was an employee for purposes of the Act. (In *Hearst*, this Court had sustained the Board's finding that certain newsboys were employees, rejecting the contention that the common law standards for distinguishing between employees and independent contractors were controlling. 322 U.S. at 120–129.) But by excluding independent contractors, Congress intended "merely to make it clear" that the term "employee" is "not meant to embrace persons outside that category under the general principles of the law of agency". 93 Cong. Rec. 6441–6442, 2 Leg. Hist. of the Labor Management Relations Act, 1947 (G.P.O., 1948), p. 1537. See also H. Rep. No. 245, 80th Cong., 1st Sess. 18, 1 Leg. Hist. 1947, p. 309; H. Conf. Rep. No. 510, 80th Cong., 1st Sess. 32–33, 1 Leg. Hist., 1947, pp. 536–537 (conference report).

[18] The "right of control" standard for distinguishing between employees and independent contractors evolved as a method for deciding whether or not a principal should be liable for the torts committed by another in the course of work being performed by the agent for the principal. See Asia, *Employment Relation: Common-law Concept and Legislative Definition*, 55 Yale L.J. 76–82 (1945). See, generally, Annot., 36 A.L.R. 2d 261 (1954). The subsequent infusion of flexibility into the relevant standards for determining employment status is especially appropriate where the purpose of the inquiry is not to decide the applicability of *respondeat superior* liability, but to determine the coverage of the National Labor Relations Act.

all of the incidents of the relationship must be assessed and weighed, and no one factor is decisive.[19]

[19] The *Restatement of the Law, Agency 2d*, states (Section 220, pp. 485–486):

"(2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

(a) the extent of control which, by the agreement, the master may exercise over the details of the work;

(b) whether or not the one employed is engaged in a distinct occupation or business;

* * * * * * *

(d) the skill required in the particular occupation;

(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

(f) the length of time for which the person is employed;

(g) the method of payment, whether by the time or by the job;

(h) whether or not the work is a part of the regular business of the employer;

* * * * * * *

(j) whether the principal is or is not in business."

It is well settled that, in determining employment status under the National Labor Relations Act, the Board may consider a variety of factors. See, *e.g.*, *National Labor Relations Board* v. *Nu-Car Carriers, Inc.*, 189 F. 2d 756, 757 (C.A. 3), certiorari denied, 342 U.S. 919; *Deaton Truck Line, Inc.* v. *National Labor Relations Board*, 337 F. 2d 697, 698–699 (C.A. 5), certiorari denied *sub nom. Teamsters, Chauffeurs, Warehousemen & Helpers Local Union 612* v. *National Labor Relations Board*, 381 U.S. 903; *Continental Bus System, Inc.* v. *National Labor Relations Board*, 325 F. 2d 267, 271 (C.A. 10). Cf. *United States* v. *Silk*, 331 U.S. 704, 719: "It is the total situation, including the risk undertaken, the control exercised, the opportunity for profit from sound management," that determines whether individuals are independent contractors. See also *Bartels* v. *Birmingham*, 332 U.S. 126; *Rutherford Food Corp.* v. *McComb*, 331 U.S. 722.

The determination whether an individual is an employee or an independent contractor thus allows considerable room for the exercise of judgment and discretion—tasks which the Board, with its wide experience in handling cases involving different hiring relationships, is specially competent to perform. As this Court explained in *Local No. 207, International Association of Bridge, Structural and Ornamental Iron Workers Union* v. *Perko,* 373 U.S. 701, 706, "problems of definition of status * * * are precisely 'of a kind most wisely entrusted initially to the agency charged with the day-to-day administration of the Act as a whole'." See, also, *Journeymen Plasterers' Protective and Benevolent Society of Chicago* v. *National Labor Relations Board,* 341 F. 2d 539, 545 (C.A. 7). In short, as with the Board's determination whether an individual is a "supervisor" within the meaning of Section 2(11) of the Act, the factors to be considered and the weight to be assigned them "are so infinite and subtle that of necessity a large measure of informed discretion is involved in the exercise by the Board of its primary function to determine" whether an individual is an independent contractor or an employee. See *National Labor Relations Board* v. *Swift and Company,* 292 F. 2d 561, 563–564 (C.A. 1). Accordingly, the Board's determination that an individual is an employee, rather than an independent contractor, is "to be accepted [by the reviewing court] if it has 'warrant in the record' and a

reasonable basis in law." *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U.S. 111, 130-131.[20]

2. We have noted that Congress intended that the determination whether a person should be classified as an employee or an independent contractor should turn on principles of agency. The Board properly applied those principles here. Even in terms of the right-of-control standard, the evidence summarized in the Statement (*supra*, pp. 5, 9–14) shows that United in fact controls and directs "not only what shall be done" by the agents "but how it shall be done." *Singer Manufacturing Co.* v. *Rahn*, 132 U.S. 518, 523. Thus, the Company designates the agents' place of work by assigning them to a particular district office and determining the group of policyholders which they are to serve, gives them detailed instructions on how to perform their duties, requires them to file elaborate peri-

[20] Although Congress, in 1947, overruled the substantive holding in *Hearst* (see n. 17, *supra*), it did not alter the part of *Hearst* dealing with the standard to be applied in reviewing the Board's determination of the kind of broad statutory issue presented here. See *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 486, n. 22; *Radio Officers' Union* v. *National Labor Relations Board*, 347 U.S. 17, 49–50. Indeed, the Court has continued to apply the standard of review articulated in *Hearst* not only in Labor Board cases (see *National Labor Relations Board* v. *Coca-Cola Bottling Co.*, 350 U.S. 264, 269), but also in cases involving other administrative determinations (*e.g.*, *Communist Party* v. *Subversive Activities Control Board*, 367 U.S. 1, 41; *Atlantic Refining Co.* v. *Federal Trade Commission*, 381 U.S. 357, 367–368). See also *Hanna Mining Co.* v. *Marine Engineers*, 382 U.S. 181, 190: "the usual deference to Board expertise in applying statutory terms to particular facts assures that its decision would * * * be respected in a high percentage of instances * * *."

odic reports, and makes frequent inspections of their financial and operational performance.

Moreover, in applying principles of agency, the Board properly weighed the evidence on the other indicia of employee-versus-independent-contractor status. Thus, the Board accorded due weight to the following relevant factors, among others (see the detailed discussion in the Statement, *supra*, pp. 4–9, 13–14): the agents do not operate their own independent businesses, but perform functions that are an essential part of the Company's normal operations; they need not have any prior training or experience, but are trained by Company supervisory personnel; they do business in the Company's name, with "tools" the Company provides, and ordinarily sell only its policies[21]; the terms and conditions under which they operate are promulgated unilaterally by the Company; the Company regards the premiums the agents collect as "trust funds" (R. 1070), for which the agents are required carefully to account[22] and for which the Company assumes the risk of loss through robbery of the agents; the agents receive the benefits of the Company's vacation plan and group insurance and pension

[21] Although some agents have sold policies of other companies, such activity is necessarily of a minimal nature in view of the time required to service the Company's customers (R. 1138, 1174–1175; 173–174, 291–292, 701–702, 770–771, 836, 841–842, 862–864). Moreover, United does "not look with favor" upon agents who sell "competing policies" for other companies (R. 410–411).

[22] The failure of some agents to remit their collections at the very time of day specified by the Company has even led to threats of embezzlement prosecutions (R. 1143–1144; 214–215).

fund; and the agents have a permanent working arrangement with the Company under which they may continue as long as their performance is satisfactory. In the light of these and the other facts in the record, the Board's conclusion that the relationship between United and its debit agents is that of employer and employees is eminently sound.

The court below refused to accept the Board's conclusion because of factors common to many sales and service occupations which the court viewed as establishing that the agents were "on their own" (R. 1235–1236). Although the agents are "on their own" in that they perform their work primarily away from the Company's offices and may fix their own hours of work and work days, their relationship to the Company clearly exhibits a large proportion of the elements which are indicative of employee status. There are, of course, elements of the relationship between United and its debit agents which, viewed separately, may seem more consistent with independent contractor status. Debit agents are not as obviously "employees" as are production workers in a factory. But neither are they as clearly "independent contractors" as is a builder retained to construct a house. The status of these debit agents has some elements of both relationships, and the question is on which side of the line they fall. That, we submit, is a matter that Congress committed primarily to the expert agency it created, and not to the reviewing courts.

The basic facts in this case—the functions of the agents, the limits of their own responsibilities, and the

extent to which and the manner in which the Company supervises and controls them—are largely undisputed. The dispute is over what inferences properly may be drawn from such facts and over what weight should be attributed to them—whether it was unreasonable for the Board to conclude that the totality of the relationship more persuasively suggests that the agents are "employees," upon whom Congress intended to confer the protections of the Act, rather than "independent contractors," whom Congress intended to exclude. The application of agency principles in the labor-relations context is a function that goes to the essence of expert judgment—one that requires the Board to bring to bear its accumulated wisdom and experience gained through nearly a third of a century of applying the statutory definitions to a myriad of variant factual situations. Here the Board found that a significant number of pertinent factors tipped the scale in favor of treating the debit agents as employees [23]—factors that similarly have led many courts to hold that debit agents are employees for var-

[23] The Board has consistently viewed debit and similar insurance agents to be employees under the National Labor Relations Act, and the insurance industry, within recent years, seems in general to have accepted that view. See *e.g.*, *National Labor Relations Board* v. *Insurance Agents*, 361 U.S. 477, 479; *National Labor Relations Board* v. *Metropolitan Insurance Co.*, 380 U.S. 438, 440, n. 2, on remand, 156 NLRB 1408, 1415–1417; *National Labor Relations Board* v. *Phoenix Mutual Life Insurance Co.*, 167 F. 2d 983 (C.A. 7), certiorari denied, 335 U.S. 845.

ious other purposes.[24] The Board's conclusion was a reasonable one on this record, and the court of appeals, having due regard for the agency's expertise in this area and the limited scope of review of such determinations, should have accepted it.

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[24] Debit agents have been held to be employees for purposes of other federal legislation. See, *e.g.*, *Capital Life and Health Insurance Co.* v. *Bowers*, 186 F. 2d 943 (C.A. 4); *Atlantic Coast Life Insurance Co.* v. *United States*, 76 F. Supp. 627 (E.D.S.C.).

Furthermore, various state courts have held the agents to be employees of the insurance company, notwithstanding that the agents:

(1) were free to set their own hours and days of work, *Gillespie* v. *Ford*, 225 S.C. 104, 81 S.E. 2d 44, 48–49; *Carter's Dependents* v. *Palmetto State Life Insurance Co.*, 209 S.C. 67, 38 S.E. 2d 905, 906–908; *Superior Life, Health & Accident Insurance Co.* v. *Board of Review*, 127 N.J.L. 537, 23 A. 2d 806, 807–808;

(2) were compensated on a commission, rather than a salary basis, *Review Board* v. *Mammoth Life & Accident Insurance Co.*, 111 Ind. App. 660, 42 N.E. 2d 379, 381; *Gulf Life Insurance Co.* v. *McDaniel*, 75 Ga. App. 549, 43 S.E. 2d 784, 787, certiorari dismissed, 203 Ga. 95, 45 S.E. 2d 64; *Gillespie* v. *Ford*, 225 S.C. 104, 81 S.E. 2d 44, 48; *Life & Casualty Insurance Co.* v. *Unemployment Compensation Commission*, 178 Va. 46, 16 S.E. 2d 357, 359;

(3) paid some of their own expenses, *Gillespie* v. *Ford*, 225 S.C. 104, 81 S.E. 2d 44, 50; *Gulf Life Insurance Co.* v. *McDaniel*, 75 Ga. App. 549, 43 S.E. 2d 784, certiorari dismissed, 203 Ga. 95, 45 S.E. 2d 64;

(4) were required to procure their own licenses, *Superior Life, Health & Accident Insurance Co.* v. *Unemployment Compensation Board of Review*, 148 Pa. Super. 307, 25 A. 2d 88, 90; *Superior Life, Health & Accident Insurance Co.* v. *Board of Review*, 127 N.J.L. 537, 23 A. 2d 806, 808;

(5) were free to solicit business throughout a whole state or states, *Life & Casualty Insurance Co.* v. *Unemployment Com-*

B. THE COURT BELOW APPLIED AN ERRONEOUS STANDARD IN REVIEWING THE BOARD'S CONCLUSION

Instead of respecting the Board's expertise on complex questions of degree, the court below proceeded, contrary to the consistent teaching of this Court, to evaluate the evidence *de novo*, and to disregard the Board's understanding of the import of the statutory terms.

Thus, echoing the view expressed in an earlier decision involving United,[25] the court concluded that the predominant factual element in determining status is that a "debit agent is 'on his own'"; he "sets his own hours of work and work days and makes his own arrangements with policy holders respecting frequency of premium payments" (R. 1235-1236). Moreover, the court discounted many of the reporting, accounting, and other controls relied on by the Board on the ground that they are indicative:

> only of the application of those financial controls, accounting procedures, and business methods and practices which would appear to be normal to the operation of the premium collection phase of the Company's business whether it be carried on through debit agents who are employees or who are independent contractors (R. 1239).

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pensation Commission, 178 Va. 46, 16 S.E. 2d 357, 359, see also *Aisenberg* v. *Adams Co.*, 95 Conn. 419, 111 Atl. 591, 592; and (6) were authorized to employ subagents, *Unemployment Compensation Commission* v. *National Life Insurance Co.*, 219 N.C. 576, 14 S.E. 2d 689, 696.

[25] *United Insurance Co.* v. *National Labor Relations Board*, 304 F. 2d 86, 90 (C.A. 7).

Similarly, the court discounted the significance of the supervision provided by the assistant manager on the ground that (R. 1240–1241):

> The Company is entitled to insist that the debit be adequately serviced and that a proper accounting of premiums collected be made whether such servicing is carried on through employees or independent contractors. Inadequate results or failure in monetary remittance to the Company would in the absence of corrective action require termination of the relationship in either case.

The Board considered that in a sense the agents are "on their own," but concluded that, on balance, this was outweighed by the other factors which were indicative of employee status.[26] It is not the function of a reviewing court to make a *de novo* assessment of the importance of the various elements of the hiring relationship, but only to satisfy itself that the evaluation made by the Board is a reasonable one. See note 20, *supra; Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 488. See, also, *Consolo*

[26] Other courts of appeals have often sustained the Board's finding of an employer-employee relationship even though the workers were "on their own". See, *e.g.*, *National Labor Relations Board* v. *Lindsay Newspapers, Inc.*, 315 F. 2d 709, 713 (C.A. 5) (motor route carriers for a newspaper); *Minnesota Milk Company* v. *National Labor Relations Board*, 314 F. 2d 761, 764–765 (C.A. 8) (milk route driver-salesmen); *National Labor Relations Board* v. *Keystone Floors, Inc.*, 306 F. 2d 560, 561–563 (C.A. 3) (carpeting salesmen for a company engaged in the retail sale and installation of home carpeting); *Interna-*

v. *Federal Maritime Commission*, 383 U.S. 607, 618–621.

That the court below undertook, itself, to reweigh the different factors is shown by its own statements: "Those [findings] which are supported by substantial evidence are, *in our opinion, consistent with an independent contractor status*" (R. 1239); "In any event, *it is our opinion* that this transfer of business factor is *not of critical significance*" (R. 1240); "The testimony concerning attendance of sales meetings * * * if appraised as evidencing Company insistence upon such attendance *is, nevertheless, equivocal*" (R. 1241). The court was clearly concerning itself with the weight rather than the sufficiency of the evidence when it stated: "There is too much which *detracts from the weight of the evidence* relied upon to support the findings and conclusions" (R. 1243). [Emphasis added in all quotations.] Thus, although the court purported to apply the proper standards of judicial review (R. 1237), in fact it improperly substituted its

tional Union of United Brewery, etc. v. *National Labor Relations Board*, 298 F. 2d 297, 299, 304 (C.A. D.C.), certiorari denied *sub nom. Gulf Bottlers, Inc.* v. *National Labor Relations Board*, 369 U.S. 843 (truck driver-salesmen for a bottling company); *National Labor Relations Board* v. *Nu-Car Carriers, Inc.*, 189 F. 2d 756 (C.A. 3), certiorari denied, 342 U.S. 919 (owner-operator trailer drivers for a company engaged in transporting motor vehicles); *Deaton Truck Line, Inc.* v. *National Labor Relations Board*, 337 F. 2d 697, 698–699 (C.A. 5), certiorari denied *sub nom. Teamsters Chauffeurs, Warehousemen & Helpers Local Union 612* v. *National Labor Relations Board*, 381 U.S. 903 (drivers of a trucking company, including owner-drivers and multiple owner-drivers).

judgment for that of the Board on a matter that lies primarily within the latter's province.[27]

This Court has long insisted that, when Congress has left the implementation and administration of a statute to an administrative agency, the role of the reviewing court is confined to determining whether the agency's interpretation results in the "application of the statute in a just and reasoned manner." *Gray* v. *Powell*, 314 U.S. 402, 411.[28] When Congress legisla-

[27] Moreover, the court below in redetermining the question of independent contractor status proceeded upon an erroneous principle of law. There is no basis for the court's assumption (R. 1239–1241) that those controls over agents which are necessary to protect United's business may not be considered and relied upon by the Board in determining the agents' status. In many instances, a company will find it impossible to carry out some of its functions without detailed controls over the persons who perform them; it is somewhat ironic to treat the fact that a high degree of supervision may be necessary as irrelevant. This factor logically and economically indicates that the nature of the business is such that it must operate with employees rather than independent contractors. See, *e.g.*, *National Labor Relations Board* v. *Phoenix Mutual Life Ins. Co.*, *supra*, 167 F. 2d at 987; *Atlantic Coast Life Insurance Co.* v. *United States*, *supra*, 78 F. Supp. at 830.

[28] The court below seems to apply different standards of judicial review in "employee" status cases than in those involving alleged "supervisors." Compare *United Insurance Co.* v. *National Labor Relations Board*, 304 F. 2d 86 (C.A. 7); *National Van Lines, Inc.* v. *National Labor Relations Board*, 273 F. 2d 402 (C.A. 7); *Frito-Lay, Inc.* v. *National Labor Relations Board*, 66 LRRM 2342 (C.A. 7), decided November 7, 1967, with *National Labor Relations Board* v. *Elliott-Williams Co.*, 345 F. 2d 460, 463 (C.A. 7); *Journeymen Plasterers' Protective and Benevolent Society of Chicago* v. *National Labor Relations Board*, 341 F. 2d 539, 545 (C.A. 7); *National Labor Relations Board* v. *American Oil Co.*, 66 LRRM 2539 (C.A. 7), decided November 8, 1967.

tively clarified the meaning of the term "employee" in 1947 and excluded "independent contractors," it did not reject *Hearst* rule that when the Board applies a broad statutory term in a particular proceeding, the function of the reviewing court is limited, and "the Board's determination that specified persons are 'employees' under this Act is to be accepted if it has 'warrant in the record' and a reasonable basis in law." 322 U.S. at 131. See, also, *National Labor Relations Board* v. *E. C. Atkins & Co.*, 331 U.S. 398, 403. Certainly, the Board's determination that these debit agents are encompassed within the term "employees" cannot be said to be unsupported by the record and unreasonable in law.[29]

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[29] Finally, there is no merit to the suggestion of the court below (R. 1242–1243) that the Board's determination of employee status was tainted by an isolated comment by the examiner with reference to the off-stand demeanor of the parties' representatives (R. 1151–1152). (See note 5, *supra.*) First, the Board's finding rests largely upon undisputed evidence (*supra*, pp. 3–14; R. 1124). Second, a fair reading of the record shows that the examiner's comment was dictum, incidental to his summary of documentary evidence (R. 1151). Accordingly, the Board could, as it did, disavow the comment (R. 1200, n. 2) without impairing the validity of the examiner's ultimate finding.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed, and the case should be remanded to that court with directions to enforce the Board's order.

Respectfully submitted.

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APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are as follows:

SEC. 2. When used in this Act—

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

* * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other

mutual aid or protection, and shall also have the right to refrain from any or all of such activities * * *.

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

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